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Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges

Hon. John Gleeson

SUPERVISING CRIMINAL INVESTIGATIONS: THE PROPER SCOPE OF THE SUPERVISORY POWER OF FEDERAL JUDGES

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INTRODUCTION

Prosecutors in the federal system wield enormous power. Their power to investigate allegations or even mere suspicions of criminal activity is plenary. Their tools of investigation are impressive. The federal grand jury, though not textually assigned to any of the branches of government,[1] "[b]asically . . . is a law enforcement agency,"[2] and its power to gather evidence is virtually unlimited.[3] Upon a proper showing, Title III of the Omnibus Crime Control

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The author was formerly an Assistant United States Attorney and Chief of the Criminal Division in the Eastern District of New York. In that capacity, he participated in several of the cases cited in this Article, most notably *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

[1] United States v. Williams, 504 U.S. 36, 47 (1992).

[2] United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), *cert. denied*, 360 U.S. 936 (1959); *see* Hon. Irving R. Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331, 336 (1954) (describing the role of the federal grand jury and noting that the United States Attorney uses the grand jury's subpoena powers to bring information forward).

[3] A grand jury "generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." United States v. R. Enters., 498 U.S. 292, 298 (1991) (internal quotation marks omitted). In addition, "absent a strong showing to the contrary," the law presumes "that a grand jury acts within the legitimate scope of its authority." *Id.* at 300. A subpoena for documents may not be quashed on relevancy grounds unless its recipient meets a virtually insurmountable burden; that is, "that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301.

and Safe Streets Act of 1968[4] permits prosecutors and the law enforcement agents working with them to intercept private conversations.[5] The federal immunity statute allows prosecutors to compel testimony without forfeiting the possibility of prosecuting the witness from whom it is compelled.[6] The contempt power of the court is available to coerce testimony from uncooperative witnesses; even those who face the prospect of being killed if they testify can be jailed if they refuse.[7] Investigating prosecutors may lawfully exploit their target's misplaced trust in friends, using those friends to induce and record incriminating conversations. Indeed, the United States Sentencing Guidelines, by giving prosecutors the key to sentencing leniency,[8] have produced a seemingly inexhaustible supply of such "cooperators."[9]

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[4] Pub. L. No. 90-351, § 802, 82 Stat. 197 (1968).

[5] *See* Wire and Electric Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2511(2)(c)-(d) (1970 & Supp. 1996).

[6] 18 U.S.C. § 6002 (1985); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1109 (1995).

[7] *See* 28 U.S.C. § 1826 (1970) (providing for suitable confinement of recalcitrant witnesses who refuse to testify without just cause until such time that the witness decides to cooperate); United States v. Doe, 862 F.2d 430, 431-32 (2d Cir. 1988) (affirming the confinement order of subpoenaed witness who refused to testify before grand jury claiming that his life had been threatened). In affirming a confinement order, the Second Circuit stated:

> Requiring the government to show both that the information it hopes to obtain from [the recalcitrant witness] is significant and that that information is unavailable from other sources would obviously impair the efficiency of grand juries. Such a requirement would bring investigations to intermittent standstills as the government set out to prove the necessity of each piece of information it sought to obtain.

Id.

[8] The key is given to prosecutors by United States Sentencing Guidelines § 5K1.1, which allows a district court to depart downward from the prescribed sentencing range based on "substantial assistance to the government" only if the prosecutor makes a motion authorizing the departure. Wade v. United States, 504 U.S. 181, 181 (1992). Congress provided the same escape mechanism for defendants facing the onerous mandatory minimum sentence for certain narcotic offenses. 18 U.S.C. § 3553(e) (1996).

[9] Research for this Article revealed no data on the number of cooperation agreements entered into before the Sentencing Guidelines took effect in 1987.

This array of investigative tools is complemented by an equally impressive arsenal of prosecutive tools. In a single stroke, the Racketeer Influenced and Corrupt Organizations Act[10] swept a broad range of criminal activity that had traditionally been the province of state prosecutors into federal court[11] and created a mechanism that permits a single trial of various crimes and various defendants that previously would have been splintered into separate trials of each crime and each defendant.[12] Under the Bail Reform Act of 1984,[13] defendants may be forced to defend the case from their prison cells even if they are not risks of flight,[14] and their assets might be frozen pending trial even if they intend to use them.[15] Once the trial begins, the rules of procedure in federal court permit prosecutors to seek convictions based on the uncorroborated testimony of a single accomplice witness.[16]

The impact of these powers on the targets of federal criminal investigations cannot be overstated. The service of a single grand jury subpoena can ruin a person's livelihood and, on occasion, even jeopardize a person's life. A lengthy investigation is likely to change the target's life irrevocably, even if there is no indictment;

However, the number of substantial assistance departures has grown dramatically as the full impact of the Sentencing Guidelines has sunk in. During the 12 months prior to September 30, 1990, federal courts departed downward due to substantial assistance in 7.5% of all cases. 1990 U.S. SENTENCING COMMISSION ANNUAL REPORT 324 tbl.C-5 (1990). By the year ending September 30, 1995, this figure had grown to 19.7%. 1995 U.S. SENTENCING COMMISSION ANNUAL REPORT 89 tbl.31 (1995).

[10] 18 U.S.C. §§ 1961-1968.

[11] *See id.* § 1961(1)(A) (1984) (racketeering activity includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year").

[12] Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 702 (1987).

[13] 18 U.S.C. §§ 3142-3148.

[14] *See id.* § 3142 (1994 & Supp. 1996); United States v. Salerno, 481 U.S. 739, 748 (1987).

[15] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 632 (1989).

[16] *See* Jeffries & Gleeson, *supra* note 6, at 1104-08.

an indictment almost certainly will change the target's life, even if there is no conviction.

As prosecutors' discretion becomes greater, so too does the risk of abuse. "The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited."[17] There is an ever-widening gulf between what prosecutors are permitted to do under the law and what may be right and just under the circumstances. A prosecutor may lawfully subpoena fee information from the target's attorney,[18] for example, but if the motive in doing so is to drive a wedge between attorney and client,[19] no prosecutor should serve such a subpoena.

These powers are frequently vested in the most inexperienced attorneys among us. New Assistant United States Attorneys, at least in New York and other large cities, tend to be only two or three years out of law school, and frequently have no prior experience with criminal cases. Mid-level supervisors are generally only four or five years further along, and a forty-year-old prosecutor is considered long in the tooth. It is true that the competition for a position as an Assistant United States Attorney is stiff, and many of them are very promising and talented young lawyers. Also, the senior supervisors in such offices—the United States Attorney, the Chief Assistant United States Attorney and the Chief of the Criminal Division—are often seasoned, experienced lawyers. But the fact remains that on a day-to-day basis, the broad prosecutorial powers that have such a dramatic impact on people and are so

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[17] United States v. Chanen, 549 F.2d 1306, 1309 (1977). *See* United States v. Williams, 504 U.S. 36, 60 (1992) (Stevens, J., dissenting) ("like the Hydra slain by Hercules, prosecutorial misconduct has many heads").

[18] *In re* Grand Jury Subpoena, 781 F.2d 238, 248 (2d Cir.), *cert. denied*, 475 U.S. 1108 (1986).

[19] Serving a subpoena on an attorney "will immediately drive a chilling wedge between the attorney/witness and his client." United States v. Klubock, 832 F.2d 649, 653 (1st Cir.), *vacated*, 832 F.2d 664 (1987) (en banc). In *Klubock*, the en banc First Circuit affirmed, by an equally divided court, a district court decision requiring federal prosecutors to seek prior judicial approval before serving a subpoena on the attorney of a represented target. *Id.* at 653-54; *see* Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995) (upholding such a rule).

susceptible to abuse are exercised by relatively inexperienced attorneys in need of supervision.

The judicial temptation to supervise them is powerful. It seems so natural: judges are more experienced, more dispassionate, better able to weigh the investigators' legitimate interests against principles of fairness and, presumably, wiser.[20] There are signs that the temptation is becoming even stronger. In *United States v. Ming He*,[21] the United States Court of Appeals for the Second Circuit criticized the Sentencing Guidelines for vesting in the prosecutor, rather than the judge, the "discretion to decide whether to reduce a sentence based on a defendant's assistance."[22] To compensate for this "especially troubling" transfer of authority, and to "balance this broad executive discretion," the Second Circuit resorted to its "supervisory power" to create the rule that during the course of criminal investigations cooperating witnesses are entitled to have counsel present at debriefings, unless they explicitly waive such assistance.[23] The court's stated purpose was to "place a check on the prosecutor's discretion," and thereby "reduce the danger of prosecutorial overreaching in what is essentially a relationship tilted heavily towards the government."[24]

Ming He was the immediate inspiration for this Article. It is the Second Circuit's most recent exercise of its supervisory authority over federal criminal investigations. It demonstrates the increasing pressure judges feel to take back, or at least balance, some of the power that has been vested in the executive branch. This is not a

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[20] *See* Dennis E. Curtis, Comment, *Mistretta and Metaphor*, 66 S. CAL. L. REV. 607, 619 (1992) (criticizing the Sentencing Guidelines for transferring sentencing authority from older, more experienced judges to federal prosecutors who "tend to spend only their early practice years" in government).

[21] 94 F.3d 782 (2d Cir. 1996).

[22] *Id.* at 788; *see supra* note 8 (briefly describing Sentencing Guidelines § 5K1.1). Actually, it is still true that only judges have the discretion to reduce a sentence on this ground, and may properly refuse to do so even if the government requests it. What the *Ming He* court found objectionable was the prosecutor's virtually unreviewable authority to decide whether to trigger this discretion, i.e., to make the "5K1.1 motion" that is a prerequisite to the exercise of the court's discretion.

[23] *Ming He*, 94 F.3d at 788, 793.

[24] *Id.* at 789.

new phenomenon; *Ming He* follows by eight years *United States v. Hammad*,[25] another exercise of the supervisory power in the criminal investigative setting, which also grew out of the court's perception that prosecutors wield too much power.

The modest goal of this Article is two-fold. First, this Article closely examines these two exercises of judicial authority by the Second Circuit to create rules in the criminal investigative setting. Both rules have failed to achieve the court's goals and, indeed, have inadvertently produced both doctrinal confusion and unintended consequences that may well harm the intended beneficiaries of the rules they prescribe.

Second, this Article examines the escalating pressure on judges to supervise prosecutors—resulting directly from the Sentencing Guidelines—which warrants a revisiting of the supervisory power. The origin and development of this source of judicial authority makes clear that it is not nearly as broad as *Hammad* and *Ming He* assume it to be. Indeed, the increasingly powerful temptation to resort to it to supervise prosecutors should be resisted. Judges are in fact not well-suited to supervise criminal investigations, a process which is generally best left to the executive branch. The attempts to supervise investigations in *Hammad* and *Ming He* reveal these institutional shortcomings, and also demonstrate the danger posed by interfering with the appropriate division of powers among the branches of government.

I. THE SECOND CIRCUIT'S EFFORTS TO SUPERVISE FEDERAL CRIMINAL INVESTIGATIONS

A. United States v. Hammad: Sham Subpoenas and Other Possible Violations of the "No-Contact" Rule

1. The Rule Established by Hammad

Hammad involved a federal grand jury investigation into the suspicious burning of the Hammad Department Store in Brooklyn,

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[25] 858 F.2d 834 (2d Cir. 1988).

New York. As the investigation progressed, the Assistant United States Attorney became aware that the store owners, Taiseer and Eid Hammad, allegedly defrauded Medicaid out of $400,000 by claiming reimbursement for orthopedic footwear when the shoes they sold were actually ordinary, non-therapeutic shoes. To disprove those allegations, the Hammads provided invoices to the Medicaid investigators purporting to reflect their purchases of orthopedic shoes from Wallace Goldstein of the Crystal Shoe Company ("Crystal").[26]

Goldstein, however, told the prosecutor that those invoices were fraudulent and were fabricated by him to help the Hammads. Goldstein also agreed to tape record conversations with the Hammads. In the first conversation, Goldstein falsely told Taiseer Hammad that Goldstein had been subpoenaed to appear before the grand jury to produce the records of Crystal's sales to the Hammad Department Store. Taiseer promptly incriminated himself, urging Goldstein to conceal the fraud by lying to the grand jury and by refusing to produce the true sales records from Crystal. He also questioned Goldstein about the subpoena. In a subsequent conversation, which was both recorded and videotaped, Goldstein showed Taiseer Hammad a fake subpoena supplied by the prosecutor as a cover for Goldstein. The subpoena called for Goldstein to appear before the grand jury with the Crystal records that reflected shoe sales to the Hammad Department Store. Taiseer Hammad was recorded devising strategies for Goldstein to avoid compliance.[27]

The Hammads were indicted six months later, and Taiseer Hammad moved to suppress the recordings of the conversations with Goldstein on the ground that the prosecutor had violated the "no-contact" rule in Disciplinary Rule ("DR") 7-104(A)(1) of the American Bar Association's ("ABA") Model Code of Professional Responsibility,[28] which applied to federal prosecutors in the

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[26] *Id.* at 835.

[27] *Id.* at 835-36.

[28] The American Bar Association's ("ABA") Model Code of Professional Responsibility provides:

> A. During the course of his representation of a client a lawyer shall not:

Eastern District of New York.[29] Specifically, he claimed that he had been represented by counsel when the Assistant United States Attorney sent Goldstein to meet with him, and that the Assistant United States Attorney had knowledge of such representation. Although the Sixth Amendment right to counsel had not yet attached,[30] and thus was not violated by the government's use of Goldstein, Hammad contended that the prosecutor had violated his ethical obligations by communicating directly with him (through the prosecutor's "alter ego," Goldstein) after learning that he had retained counsel.[31]

> 1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1996). This no-contact rule also exists, in similar terms, in Rule 4.2 of the ABA's Model Rules of Professional Conduct.

[29] For the most part, federal district courts do not promulgate their own individual rules governing the conduct of attorneys who appear before them. Rather, they generally incorporate by reference either the American Bar Association's ("ABA") Model Code of Professional Responsibility, initially adopted in 1970, the ABA's Model Rules, which were adopted in 1983 to supersede the Model Code, or the rules adopted by the highest court of the state in which the district is located. On occasion, as was the case in the Eastern District of New York until March 1997, more than one set of rules were incorporated, resulting in confusion over which rules the attorneys must follow. *See generally* Committee on Criminal Law, Establishing Ethical Standards for Federal Prosecutors and Defense Lawyers, 49 REC. ASS'N B. CITY N.Y. 21, 22 (1994) [hereinafter Committee on Criminal Law]. The Eastern District of New York amended its local rules in March 1997, to adopt the New York Code of Professional Responsibility.

[30] *See* U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to have . . . the assistance of counsel for his defence."); Kirby v. Illinois, 405 U.S. 682, 688 (1972) ("In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45 [(1932)], it has been firmly established that a person's Sixth and Fourteenth amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him [or her].").

[31] *Hammad*, 858 F.2d at 836.

The Second Circuit agreed that the disciplinary rule was violated. First, it rejected the government's argument that the no-contact rule should not apply to criminal investigations until the right to counsel has attached. This view, the court held, would render the disciplinary rule "superfluous."[32] The court viewed the disciplinary rules as a source of "protections not contemplated by the Constitution,"[33] and reasoned that DR 7-104(A)(1) would afford no protection at all if it could be invoked only when the Sixth Amendment right had attached. The court also rejected the government's proposed limitation on the applicability of the disciplinary rule because it would give the government too much power:

> [W]e resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances.[34]

Second, the court recognized that prosecutors perform investigative duties in federal criminal investigations, and are "'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations."[35] It further held that "the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization."[36] However, the court held that there were limits to this broad investigative power, and the prosecutor's issuance of a sham subpoena to Goldstein exceeded those limits.[37] This turned Goldstein into the "alter ego of the prosecutor,"[38] resulting in a violation of the disciplinary rule. The court explicitly declined to identify the sorts of investigative stratagems which, like a "sham" subpoena, would

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[32] *Id.* at 839.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

convert the use of a wired informant against a represented target into a violation of the disciplinary rule.[39]

Finally, the court in *Hammad* held that the suppression of evidence was available to remedy violations of DR 7-104(A)(1) in criminal investigations.[40] It found this authority in the supervisory power of federal courts. The court concluded that "[j]udicial supervision of the administration of criminal justice in the federal courts . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence."[41] Thus, although the district court's order of suppression was reversed, that was only because the law had been previously unsettled, and the remedy was held to be available in future cases at the discretion of the district judge.[42]

Hammad thus established a new rule for federal criminal investigations. The rule applies to noncustodial contacts with targets of an investigation in the preindictment stage, which the Fourth, Fifth and Sixth Amendment protections do not reach. The rule is this: if the target has retained an attorney in connection with the investigation and the prosecutor knows it, it is generally permissible to use a "wired" informant to obtain incriminating statements from the target; but, if the prosecutor does something that is later found to have overstepped permissible bounds, the prosecutor will have violated DR 7-104(A)(1) and the statements may be suppressed.

2. *The Consequences of the Rule*

Hammad's use of the supervisory power to create a new rule for federal criminal investigations has spawned both unintended adverse results and doctrinal chaos. First, in its effort to protect the rights of persons under investigation, the decision inadvertently created an incentive to isolate from the investigation the people who are best able to recognize those rights and ensure they are not violated. Until *Hammad*, the rights of individuals being investigated

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[39] *Id.*

[40] *Id.*

[41] *Id.* at 841 (quoting Justice Frankfurter in McNabb v. United States, 318 U.S. 332, 340 (1943)).

[42] *Id.* at 842.

or prosecuted by the government were all rights as against the *government*. However, by construing a disciplinary rule to confer an otherwise nonexistent protection to some criminal suspects (those with the inclination and resources to retain counsel during an investigation), *Hammad* conferred a right as against only *part* of the government—its attorneys. Indeed, it gave law enforcement agencies a powerful incentive to carve the attorneys—presumably those in the best position to ensure that the law is obeyed—out of the investigative process. This incentive became especially clear in the subsequent decisions rejecting *Hammad* motions.[43] Those decisions were correctly viewed in the law enforcement community as endorsements of investigative strategies that kept prosecutors either minimally informed or entirely in the dark. The law should never create such an incentive, and *Hammad* obviously did not intend to do so. Indeed, it explicitly "recognized that prosecutors have a responsibility to perform investigative . . . duties in criminal matters."[44] By allowing a disciplinary rule to become the vehicle of new-found rights, however, it encouraged law enforcement officers to isolate the prosecutors from investigations.

Another unintended consequence of *Hammad* was its chilling effect on the natural development of the law. *Hammad* found DR 7-104(A)(1) to be the source of a new "right" in the investigative stage, but explicitly declined to state the contours of the right by

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[43] *See, e.g.*, United States v. Thompson, 35 F.3d 100, 104 (2d Cir. 1994) (rejecting a *Hammad*-based challenge to an agent's interview of a represented suspect on the ground that "*Hammad* does not support the extension of a rule of professional conduct governing attorneys to an *agent* performing an investigative function") (emphasis added); United States v. Buda, 718 F. Supp. 1094, 1096 (W.D.N.Y. 1989) (denying a *Hammad* motion because the prosecutor only "acquiesced" in the "wiring" of an informant against a represented target, and did not participate in preparing the informant for the conversation). *See also* United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (stating that because the Assistant United States Attorney "did not even know what [the agent who wired the informant] was doing," the "ethical canons did not restrict" the investigation); United States v. Gray, 825 F. Supp. 63, 64 (D. Vt. 1993) (stating that the agents' interview of represented target did not violate the disciplinary rule because the Assistant United States Attorney neither "control[led] the agents' independent investigation" nor instructed them regarding what to ask the target).

[44] *Hammad*, 858 F.2d at 839.

"list[ing] all possible situations that may violate DR 7-104(A)(1)," leaving that for "case-by-case adjudication."[45] Thus, district courts were left to determine when a prosecutor had "overstep[ped] the already broad powers of his office, and in so doing, violate[d] the ethical precepts of DR 7-104(A)(1)."[46] Ordinarily, such case-by-case adjudication is a healthy and natural way for the law to grow; district courts, armed with a stated principle, apply it to the various factual situations that come before them, subject to appellate review. However, by grounding the right in a disciplinary rule, *Hammad* has stunted this kind of growth. The stakes are simply too high. In weighing whether a particular investigative technique (such as the sham subpoena in *Hammad*) might be found by some judge at some future time to have "overstepped" the powers of the office, prosecutors who guess wrong not only risk losing evidence, but also risk losing their licenses to practice law.[47] For years, this has stifled the tendency to test the limits of the law, which otherwise comes naturally to lawyers.[48]

Doctrinally, *Hammad* started out on unstable ground, and matters have only gotten worse. Its essential holding is that supplying a sham subpoena to a cooperating witness exceeds a prosecutor's broad powers and violates DR 7-104(A)(1). However, there is no fit between the conduct found offensive and the rule it was found to violate. Even assuming there is something objectionable about providing an informant with a sham subpoena,[49] the

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[45] *Id.*

[46] *Id.*

[47] It may well be that all the prosecutor risks is disciplinary sanction. Since the court deliberately left "unsettled" the types of conduct that trigger a violation, suppression may not be ordered on a new application of the *Hammad* rule. *Id.* at 842.

[48] *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 473 (1996); Todd S. Schulman, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1078-79 (1996).

[49] *Hammad* never explained why the sham subpoena overstepped the bounds of the prosecutor's authority, and other courts that have addressed the issue have flatly rejected such claims. For example, Judge Dolores K. Sloviter of the Third Circuit stated:

impropriety of this technique certainly does not turn on whether the target is represented. If the goal is to curb prosecutorial overreaching, the unrepresented person—who receives no added protection from the *Hammad* rule—is the more vulnerable target. In short, the goal underlying the no-contact rule is not enhanced by *Hammad*, which instead simply extends a modicum of further insulation to those who happened to have retained counsel.

Second, by viewing the disciplinary rules as a source of rights in addition to those secured by the U.S. Constitution, *Hammad* overlooked the true purpose of the rules: to regulate and discipline attorneys. This was critical to the court's rejection of the government's argument that the no-contact rule should not apply in the investigative stage. When the rules are perceived as a source of rights for prospective criminal defendants, the government's argument, if accepted, would indeed have rendered it superfluous. However, when the no-contact rule is viewed as a mechanism for attorney discipline, it is not superfluous at all, whether or not its scope is made coextensive with the scope of the Sixth Amendment right.[50]

In certain respects, *Hammad* has become isolated over time. Its holding that the no-contact rule applies during the investigative phase of criminal cases has been rejected by every other circuit that has addressed the issue to date.[51] The number of devices that will

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> If government officials may pose as non-existent sheiks in an elaborately concocted scheme, supply a necessary ingredient for a drug operation, and utilize landing strips, docking facilities, and other accoutrements of an organized smuggling operation, all in order to catch criminals, then their use of a subpoena in the name of an undercover agent to enable him to retain his credibility with suspected criminals seems innocuous by comparison.

United States v. Martino, 825 F.2d 754, 760 (3d Cir. 1987) (citations omitted).

[50] *See* United States v. Ryans, 903 F.2d 731, 740 (10th Cir. 1990) (opining that the holding that DR 7-104(A)(1) attaches only when the Sixth Amendment right has attached does not render the rule superfluous because the "exclusion of evidence is not the only possible remedy under the disciplinary rule").

[51] *See, e.g.*, United States v. Balter, 91 F.3d 427 (3d Cir. 1996); United States v. Powe, 9 F.3d 68 (9th Cir. 1993); United States v. Ryans, 903 F.2d 731 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986); United States v. Dobbs, 711 F.2d 84 (8th Cir. 1983);

push an otherwise authorized undercover contact with a represented target over the line into unethical territory remains at one: sham subpoenas. Although lower courts in the circuit are still asked from time to time to add others,[52] there is no indication that the brief list will ever lengthen.

Even the Second Circuit has distanced itself from *Hammad*. One year later, the court emphasized that its holding was limited to the facts of the case.[53] A more recent decision, *Grievance Committee for the Southern District of New York v. Simels*,[54] arguably has the effect of overruling it. *Simels* addressed the applicability of the "no-contact" rule to defense attorney conduct. Two days before the beginning of the trial of Brooks Davis and others on narcotics charges, an accomplice witness was shot. The next day, Aaron Harper was arrested in connection with the shooting, and he immediately cooperated with the government. On the first day of the trial, the government charged Harper with the attempted murder of the witness and stated that it would also charge Brooks Davis and others with that crime. Harper's cooperation with the government made him a witness in the pending narcotics trial and a potential codefendant of Davis, as well as a potential witness against him with respect to the shooting of the witness.[55]

United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

[52] *See, e.g.*, United States v. Tracy, No. 94-CR-142S, 1995 WL 522807 (W.D.N.Y. Aug. 24, 1995), *aff'd*, No. 564, Docket 96-1100, 1997 WL 109210 (2d Cir. Mar. 13, 1997). In *Tracy*, the feature of the investigation that the defendant claimed had triggered the *Hammad* rule was the fact that the represented target was himself an attorney. *Id.* at *4. As required by *Hammad*, the district court performed a post hoc survey of the investigation to determine whether the prosecutor's conduct seemed "egregious." *Id.* at *5-6. After examining "all of the facts and circumstances of the investigation," including the tape recordings of the defendant, and comparing the investigation to a similar case that had withstood *Hammad*-type scrutiny, the court found that the Assistant United States Attorney had not engaged in egregious misconduct, and denied the motion. *Id.*

[53] United States v. Schwimmer, 882 F.2d 22, 29 (2d Cir. 1989).

[54] 48 F.3d 640 (2d Cir. 1995).

[55] *Id.* at 642-43.

The next day, Davis's attorney, Simels, visited Harper in his jail cell. Without the consent of Harper's attorney, Simels procured an affidavit from Harper, which was offered to undermine Harper's testimony in the narcotics trial. Simels found himself accused not only of knowingly presenting a false affidavit and with using threats to get Harper's signature on it, but with a violation of the no-contact rule for interviewing Harper.[56]

The Second Circuit reversed the sanctions against Simels, relying on very narrow constructions of the terms "party" and "matter" in DR 7-104(A)(1).[57] Rejecting state court and bar association interpretations of DR 7-104(A)(1), the court emphasized the need for a federal interpretation of such rules in order to implement important policies. The court held that even individuals named in the same charging instrument are not "parties" to the same proceeding if one will testify against the other, and indeed may not even be "parties" if they are actual codefendants.[58] This narrow construction was chosen because it "establishes a clear line which allows both defense attorneys and prosecutors to carry out their respective and necessary roles in our federal criminal justice system without the threat of disciplinary action . . . ."[59]

Simels cannot be dismissed simply because the attorney was a defense attorney who had Sixth Amendment obligations that prosecutors do not share. To the contrary, the court repeatedly emphasized that the case had added significance because its interpretation of DR 7-104(A)(1) would apply to prosecutors as well. It insisted on a federal interpretation of the rule in order to avoid the "balkanization" of the law governing investigations. The court then narrowly interpreted the rule in order to allow defense attorneys and prosecutors to do their jobs without the fear of disciplinary sanction.[60]

Although *Simels* did not overrule *Hammad*, it is difficult to conclude that there is much left of it. First, even after the government had charged one and announced in court its intention to

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[56] *Id.* at 643.
[57] *Id.* at 644.
[58] *Id.* at 650.
[59] *Id.* at 651.
[60] *Id.* at 645, 651.

charge the other with the same crime, if Harper and Davis were not "parties" to a "matter" for the purposes of DR 7-104(A)(1), it is hard to conclude that a target of a grand jury investigation is a "party" to anything. Indeed, the court admonished that merely "potential" codefendants must not be considered "parties."[61] By definition, the target of a grand jury investigation is at most a potential defendant, and it will be difficult to reconcile any future application of DR 7-104(A)(1) in that setting with *Simels*.

Most importantly, and again without explicitly rejecting *Hammad*, *Simels* adopted a fundamentally different approach to the purpose of the no-contact rule itself. Whereas *Hammad* viewed the no-contact rule as a source of rights for prospective criminal defendants—additional protections over and above the constitutional "floor"[62]—*Simels* stripped the rule of that lofty status: "It is evident, therefore, that DR 7-104(A)(1), both in origin and scope, is primarily a rule of professional courtesy. If it were more than that, DR 7-104(A)(1) also would have provided protection for unrepresented parties . . . ."[63] Further, in a sweeping statement at the outset of the opinion, the Second Circuit adopted a significantly narrower view of the supervisory power of federal courts than it demonstrated in *Hammad*. Acknowledging that the interpretation of DR 7-104(A)(1) would affect not only defense practices but could also produce unwarranted changes in "traditional law enforcement" practices, the court stated: "The conceded power of federal district courts to supervise the conduct of attorneys should not be used as a means to substantially alter federal criminal law practice."[64]

Although these subsequent cases have sought to isolate the holding of *Hammad*, its continuing effects are substantial. First, it has recently been cited by the Second Circuit to support the proposition that the federal courts' general supervisory power over attorneys allows them to promulgate rules of practice in criminal investigations.[65] Second, despite *Simels*, district courts within the

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[61] *Id.* at 650.

[62] United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).

[63] *Simels*, 48 F.3d at 647.

[64] *Id.* at 644 (footnote omitted).

[65] United States v. Ming He, 94 F.3d 782, 792 (2d Cir. 1996). *See infra* Part II.A (discussing *Ming He*).

circuit apparently continue to regard *Hammad* as authority for the suppression of evidence pursuant to the supervisory power if an otherwise lawful investigative tactic violates a disciplinary rule.[66]

Third, by allowing disciplinary rules to establish investigative restrictions that the U.S. Constitution and laws of the United States do not impose, *Hammad* inspired other efforts by the organized bar to make disciplinary rules the source of rights that the courts have found do not otherwise exist. Some of these efforts have been shamelessly self-serving. In 1989, the year after *Hammad* and shortly after the Supreme Court rejected Fifth and Sixth Amendment challenges to the forfeiture of assets used to pay attorneys' fees,[67] a committee of the American Bar Association proposed an ethical standard prohibiting prosecutors from seeking forfeiture of assets that would be used to pay defense attorneys.[68] Even stalwart members of the defense bar harshly criticized this "audacious use of power," which seemed to arise out of "a crass concern to protect sources of income."[69] The measure was not included in the final version adopted in 1992.[70]

After courts rejected Sixth Amendment challenges to subpoenas to attorneys for fee information about clients,[71] amendments to

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[66] *See* United States v. Cantor, 897 F. Supp. 110, 114-15 (S.D.N.Y. 1995) (rejecting a motion to suppress statements made by a corrupt attorney on the ground that the prosecutor failed promptly to report the defendant/attorney's dishonesty to the grievance committee, in violation of DR 1-103(A)).

[67] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

[68] Robert G. Morvillo, *Forfeiture of Legal Fees*, N.Y. L.J., Apr. 2, 1991, at 3. Proposed Standard 3-3.12 of the Prosecution Function Standards of the American Bar Association, adopted by the Criminal Justice Section in November 1989, states:

> A prosecutor should not use statutory forfeiture provisions to prevent a defendant from paying counsel of choice or paying other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe that these payments constitute a sham, fraud, or criminal conduct.

Id.

[69] *Id.*

[70] *See* Symposium, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. PITT. L. REV. 271, 277 n.25 (1992).

[71] *See, e.g., In re* Grand Jury Subpoena, 781 F.2d 238 (2d Cir.), *cert. denied*, 475 U.S. 1108 (1986); United States v. Goldberger & Dubin, 935 F.2d 501 (2d

disciplinary rules were adopted restricting the use of such subpoenas and requiring prior judicial approval before they are served. The outcome of these efforts has been inconsistent and chaotic. For example, an ethical rule requiring prior judicial approval of a grand jury subpoena to a defense attorney constrains prosecutors in the First Circuit;[72] and a virtually identical rule was invalidated by the Third Circuit.[73] The challenge to a new Colorado rule regarding attorney subpoenas is pending. One aspect of Colorado's rule, which mirrors ABA Model Rule 3.8, is especially troubling. Like other attorney-subpoena rules, it allows a prosecutor to subpoena fee information only if it is "essential to the successful completion" of the investigation.[74] However, the Colorado Supreme Court has eliminated the requirement of prior judicial approval.[75] Thus, there is no mechanism to obtain preclearance of such subpoenas. Any prosecutor who serves one therefore runs the risk that a judge will later deem the subpoena to have been "nonessential" and impose a disciplinary sanction. It is hard to fathom a more powerful disincentive to the taking of a concededly lawful investigative step.

The *in terrorem* effect of a state bar's rules of conduct are not restricted to federal prosecutors in that state. A prosecutor whose contacts with a represented target in the District of Columbia survived a motion to suppress in a District of Columbia court was nevertheless subjected to disciplinary action in New Mexico, where

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Cir. 1991).

[72] Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995). The rule in Rhode Island was Rule 3.8(f) of the ABA's Model Rules of Professional Conduct. *Id.* at 1353. Added to the Model Rules in 1990, Rule 3.8(f) prohibited the subpoenaing of an attorney to give testimony about a client without a showing of need, an adversary hearing and prior judicial approval. *Id.* The Rhode Island Supreme Court had adopted the Model Rules, and the federal district courts in Rhode Island had adopted Rhode Island's rules. *Id.*

[73] Baylson v. Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992). The court held that Rule 3.10 of the Pennsylvania Rules of Professional Conduct, which was adopted by the federal district courts in Pennsylvania, could not be enforced against federal prosecutors in those districts because: (1) its adoption exceeded the rulemaking authority of the district courts; and (2) to do so would violate the Supremacy Clause. *Id.* at 104.

[74] COLO. RULES OF PROFESSIONAL CONDUCT Rule 3.8(f)(ii) (1997).

[75] *Id.* Rule 3.8 cmt. [3].

he happened to be a member of the bar.[76] The effort by the U.S. Department of Justice to enjoin that disciplinary action on Supremacy Clause grounds was rejected by the District of Columbia Circuit on the ground that it had no personal jurisdiction over the Chief Counsel of the New Mexico disciplinary committee.[77]

Moreover, despite its emphatic statement that federal courts must determine the boundaries of ethical rules that affect federal investigations, even *Simels* is vulnerable to "correction" by the state bar. *Simels* did not overrule *Hammad's* application of the no-contact rule to federal criminal investigations. Thus, *Simels'* allocation of the power to interpret the rule to federal courts does not alter the fact that the *terms* of the rule are the exclusive prerogative of the state disciplinary apparatus. Put another way, for all its discussion about avoiding the "balkanization"[78] of the law of federal investigations, *Simels* left intact the means by which the state bar associations can balkanize it. The narrow interpretation of DR 7-104(A)(1) was no doubt viewed by some as an invitation to amend it.

The invitation has been accepted. The Second Circuit's narrow interpretation of the term "party"—adopted for the explicit purpose of keeping the disciplinary rules from becoming surrogate rules of criminal practice—has caused the New York State Bar Association to amend the rule to prohibit contacts with represented *persons*, rather than parties. Explaining the change, which was adopted by the House of Delegates on January 24, 1997, the association stated that it was responding to "incorrect arguments" that the no-contact rule applies only in matters that are "actively being litigated" and "does not apply to non-party witnesses."[79] These, however, are not

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[76] *See In re* Doe, 801 F. Supp. 478, 480-81 (D.N.M. 1992).

[77] United States v. Ferrara, 54 F.3d 825, 832 (D.C. Cir. 1995).

[78] Grievance Committee v. Simels, 48 F.3d 640, 645 (2d Cir. 1995) (using the word "balkanize" to describe the potential effects of requiring federal courts to follow varied interpretations of disciplinary rules).

[79] The quoted material appears in the "Explanation of Charge" accompanying the Proposed Amendment to DR 7-104(A)(1) of the New York Code of Professional Responsibility, adopted January 24, 1997. The amendment still requires the approval of the Appellate Division of the Supreme Court of the State of New York.

just "arguments"—they can fairly be described as the *holding* of *Simels*. The recent amendment, if accepted by the appellate division, will no doubt be cited as a reason to once again apply the no-contact rule to prosecutors in the preindictment investigative setting.

Bar associations are not the only organizations seeking to influence the impact of disciplinary rules on criminal investigations. As a direct result of *Hammad*, the Department of Justice promulgated regulations permitting federal prosecutors to contact represented parties in certain circumstances.[80] No-contact rules exempt contacts "authorized by law," and the Department of Justice hopes that its regulations will be recognized as the "law" by which its prosecutors' contacts are "authorized."[81] This effort has thus far proven unsuccessful. No court has adopted the Department of Justice's view that its own pronouncements suffice to exempt contacts by federal prosecutors; some courts have rejected the argument outright.[82]

Legislators have also gotten involved. A bill currently pending in the United States House of Representatives would trump the Department of Justice guidelines by subjecting federal prosecutors to be subject to the state disciplinary rules despite the federal regulations.[83] In the last Congress, a Senate Bill would have

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[80] 28 C.F.R. § 77 (1994).

[81] U.S. ATTORNEY'S MANUAL § 9-13.240 (1994).

[82] A district judge in Missouri flatly rejected the Department of Justice's argument, finding it had no authority "to issue regulations which exempt its attorneys from the requirements of state ethical rules." United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., No. 4:93CV02188 (GFG), 1997 WL 106717, at *6 (E.D. Mo. Mar. 10, 1997). A district court in California likewise rejected as "preposterous" the attempt by the Department of Justice to rely on the infamous "Thornburgh Memorandum," the predecessor of the new regulations. United States v. Lopez, 765 F. Supp. 1433, 1453 (N.D. Cal. 1991), *vacated on other grounds*, 989 F.2d 1032 (9th Cir.), *amended*, 4 F.3d 1455 (9th Cir. 1993). A more recent decision of the Ninth Circuit states that "[r]ather than interpreting the regulation as an exception to prevailing ethical norms [barring contact], we believe that the regulation should be interpreted in accordance with those norms." Graham v. United States, 96 F.3d 446, 449 (9th Cir. 1996). *See* Schulman, *supra* note 48, at 1119 (contending that the Department of Justice's regulations were improperly promulgated and cannot preempt state ethical rules).

[83] H.R. 232, 105th Cong. (introduced Jan. 7, 1997).

produced the opposite result, i.e., it provided that the Attorney General's rules of conduct applied to federal prosecutors notwithstanding the ethical rules of the states.[84]

This fiasco, for which *Hammad* alone is responsible, raises several important issues. Some are beyond the scope of this Article, such as the obvious (and critical) question of who should decide the substance of the rules governing the conduct of prosecutors and defense attorneys in federal court proceedings.[85] For present purposes, however, the pandemonium that is *Hammad's* legacy is the most dramatic example of the problems that can arise when a court uses its supervisory power not to enforce existing rights, but to create new ones that have been denied by other sources of federal law.

II. *UNITED STATES V. MING HE*: REQUIRING COUNSEL TO BE PRESENT DURING DEBRIEFINGS OF COOPERATING WITNESSES

A. The Rule Established by Ming He

Ming He was a twenty-seven-year-old member of the Tung On, a Chinatown gang. Ming He started out his relationship with the government as a confidential informant, but his own involvement in the gang's criminal activities resulted in a plea agreement that provided for Ming He's cooperation as a witness. The agreement, reached with the government after extensive negotiations with Ming

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[84] Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 75, 104th Cong., 1st Sess. § 502 (introduced Jan. 4, 1995) ("Notwithstanding the ethical rules or the rules of the court of any State, Federal rules of conduct adopted by the Attorney General shall govern the conduct of prosecutions in the courts of the United States.").

[85] There is no shortage of views on this issue. *See, e.g.*, Committee on Criminal Law, *supra* note 29, at 21; Roger C. Crampton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Green, *supra* note 48, at 460; F. Dennis Saylor & J. Douglas Wilson, *Putting a Square Peg in a Round Hole; The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992).

He and his attorney, called for Ming He to plead guilty to racketeering.[86]

The cooperation agreement obligated Ming He to "cooperate fully" with the prosecutor.[87] Ming He agreed to be debriefed about his criminal activities and to provide "truthful, complete and accurate information" about them, as well as testimony at trials.[88] In return, the government promised to file a motion pursuant to United States Sentencing Guideline § 5K1.1, which, as noted above, would permit the district court to impose a sentence below the prescribed range to reward Ming He for his "substantial assistance" to the government.[89] The agreement, however, specifically stated that the government's determination of whether Ming He provided "substantial assistance" would be binding on him, as would its determination of the "truthfulness, completeness and accuracy" of the information he provided.[90]

The prosecutor concluded that Ming He had not fully complied with his obligations under the agreement. Specifically, during his debriefings, Ming He was initially reluctant to acknowledge his role in a murder conspiracy. However, rather than refusing to submit a § 5K1.1 motion, which would have precluded any downward departure at all, the prosecutor filed a motion but noted this deficiency in Ming He's cooperation. As the Second Circuit put it, the government "disparaged Ming He's assistance" in the motion, informing the sentencing court that it did not call him as a witness at the multi-defendant Tung On trial because of his initial untruthfulness during the debriefing sessions.[91]

In a presentence submission, defense counsel objected to these disparaging comments on the ground that they sought to penalize Ming He for statements made in meetings outside her presence and without her permission. Counsel claimed that had she been present

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[86] United States v. Ming He, 94 F.3d 782, 785-86 (2d Cir. 1996) (charging Ming He with violating 18 U.S.C. § 1962; the specified racketeering acts were conspiracies to extort money from businesses and to commit arson).

[87] *Id.* at 786.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

during the debriefing, she could have counselled Ming He to answer the prosecutor's questions more truthfully.[92]

At the sentencing proceeding, the prosecutor stated that it was the "standard practice" in the district to debrief cooperating witnesses in the absence of counsel, a practice the district judge found "unremarkable."[93] The court further found defense counsel's stated practice of attending all such debriefings "unusual," noting that most attorneys are "uninterested in attending their clients' debriefing sessions."[94] Explicitly relying on the prosecutor's "disparaging" comments, the court granted only a minimal downward departure—to sixty months from a sentencing range of sixty-three to seventy-eight months.[95]

On appeal, the Second Circuit began with an analysis of "the impact and utility of § 5K1.1 motions on sentencing."[96] The court expressed harsh criticism of the new balance of power under the guidelines. Before the guidelines, it observed that district judges had the discretion to decide whether to reduce a sentence based on substantial assistance. The court stated that because of their experience, judges are "particularly well-positioned" (compared to prosecutors) "to evaluate moral worthiness, contrition and rehabilitation," factors that are often critical in the sentencing of a cooperating defendant.[97] However, "[u]nder the Guidelines this sentencing power—of such great moment to a cooperating witness—was transferred from the sentencing court to the prosecutor" by the requirement in § 5K1.1 that a court may make a downward departure for cooperation only when a prosecutor authorizes it to do so by filing a motion.[98]

The court found this transfer of power from judges to prosecutors "especially troubling" and subject to abuse.[99] Quoting the same passage of *McNabb v. United States* that it relied on in

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 787.
[96] *Id.* at 788.
[97] *Id.*
[98] *Id.*
[99] *Id.*

Hammad, i.e., the "[j]udicial supervision of the administration of criminal justice in the federal courts . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence,"[100] the Second Circuit concluded that it had both the authority and the obligation to prescribe rules to "balance this broad executive discretion."[101]

In exercising this power in the context of debriefing sessions, the court evaluated the role of counsel at such meetings. In contrast to the government's claim that counsel's role, if any, is limited to telling her client to be truthful, the court listed various functions of counsel: (1) explaining the government's questions; (2) keeping the client calm, thus avoiding "unthinking answers" that are blurted out; (3) keeping the client focused on the fact that the prosecutor is his adversary; (4) resolving potential disagreements and assisting the defendant in clarifying his answers to ensure they are complete and accurate; and (5) serving as a potential witness to the completeness of the client's cooperation.[102] Moreover, the court observed that debriefing sessions have now become crucial events for accomplice witnesses: the prosecutor has almost unreviewable discretion to refuse to make a § 5K1.1 motion,[103] and such a refusal could significantly increase the time the accomplice witness will serve in prison. "To send a defendant into this perilous setting without his attorney," the court concluded, is "inconsistent with the fair administration of justice."[104] Thus, relying on its supervisory power "to secure rights even though they may not be guaranteed by the Constitution when we are persuaded [that] a procedure followed in a trial court is wrong," the court held that "cooperating witnesses are entitled to have counsel present at debriefings, unless they explicitly waive such assistance."[105]

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[100] *Id.* at 789 (quoting Justice Frankfurter in McNabb v. United States, 318 U.S. 332, 340 (1943)).

[101] *Id.*

[102] *Id.* at 789-90.

[103] *See* United States v. Rexach, 896 F.2d 710, 713 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990).

[104] *Ming He*, 94 F.3d at 790.

[105] *Id.* at 792-93.

B. *The Misunderstanding that Gave Rise to the Rule*

The rule announced in *Ming He* is based on a misunderstanding of how defense attorneys and prosecutors conduct themselves when a defendant has chosen to cooperate. This misunderstanding is responsible for the opinion's basic premise—that the prosecutors' "standard practice" of debriefing a cooperating defendant in the absence of counsel is somehow unfair or overreaching, or both.

In fact, "[t]he sentencing court found the challenged practice 'unremarkable'" because it is.[106] The overwhelming majority of debriefing sessions with cooperating witnesses occur in the prosecutors' offices without the presence of the witness's attorney. Indeed, although the attorney knows that debriefings will occur during the course of the cooperation, they almost always occur without any notice to the attorney. This is not because prosecutors are being sneaky, or because the attorneys for the witnesses are being lazy or incompetent. Additionally, this does not happen because attorneys fail to perform most of the functions identified by the court in *Ming He*, including keeping the client calm and focused, and explaining the procedure and the prosecutor's questions. Rather, this happens because those functions are largely performed at a prior and more critical stage of the investigation—the proffer sessions that precede a cooperation agreement.

1. *The Proffer Session*

The process of becoming a cooperating witness does not start with debriefing sessions. Before the first such debriefing occurs—before there is even a cooperation agreement—the prosecutor will have at least one, and often several, substantive meetings with the prospective cooperating witness. These meetings, called "proffer sessions," always include counsel for the witness. They occur pursuant to a separate, preliminary agreement called a "proffer agreement."[107]

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[106] *Id.* at 786.

[107] *See, e.g.*, United States v. Fagge, 101 F.3d 232, 233 (2d Cir. 1995)

The purpose of the proffer session is to get all of the information necessary to a plea offer (or to determine whether one will be made) on the negotiating table. The prosecutor needs to know several things before she can make an informed offer. Some relate to the crime or crimes under investigation. Initially, the prosecutor wants to know the defendant's version of his or her own role in the crime. This will be measured against the information already available to the investigators in an effort to determine whether the prospective witness will tell the truth (or at least what the prosecutor then believes to be the truth) about his or her own conduct. Prospective cooperators rarely deny their criminality, but the temptation to minimize it is strong, and for some it is insurmountable. Some proffer sessions end abruptly, without any plea offer, because the defendant cannot pass even this first test.

Some also fail the next test as well, which is to talk about the conduct of the others involved in the crime. Certain defendants who genuinely want to be government witnesses are simply unable to testify against other people, and do not get offered cooperation agreements as a result.

The prosecutor also uses proffer sessions to determine what "baggage" a witness will bring to the witness stand at trial. Because future cross-examinations of the witness will not be limited to the

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(noting that prior to two proffer sessions, appellant signed a proffer agreement that provided: "Should any prosecutions be brought against Client by this Office, the government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting . . . ."). A proffer agreement is a contract setting forth the terms defining how a particular "defendant is debriefed by the government in exchange for limited use immunity." Lawrence D. Finder, *Supreme Court Examines Waiver of Defendant's Procedural Rights*, 32 HOUS. LAW. 10, 10 (1994). The agreement ensures both that the government will have the opportunity to examine information provided by the defendant, and that such information will not be used against the defendant at trial, should negotiations fail. *Id.* Additionally, "most proffer agreements also contain a waiver clause that allows the government to impeach the defendant at trial with his proffered statements should the defendant's testimony vary from the information he provided during the proffer." *Id.* Finally, proffer agreements generally do not protect against the derivative use of the defendant's statements.

crimes under investigation, the prosecutor needs to know about all of the criminal activity in the witness's past, whether or not the government is aware of it.[108] Prior crimes that are disclosed during the proffer session will be covered by any resulting plea agreement, so the terms of the government's offer (and, indeed, whether there will be an offer at all) depend in part on the other criminal activity disclosed during the proffer session.[109] Thus, at bottom, the prospective cooperating witness is asked in a proffer session to tell a prosecutor about crimes the prosecutor has no knowledge of, which may result in a worse deal (or no deal at all) for the witness.[110] Needless to say, this sort of disclosure does not come naturally to experienced criminals.

The attorney for the prospective witness plays a crucial role during the proffer sessions. These are the client's first face-to-face contacts with the prosecutor and case agent. There is every reason to be nervous "because the interview process intimidates" and because the client is expected to incriminate "people who may be predisposed to commit violence against him or his family."[111] The lawyer often helps the client resist the natural temptation to

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[108] *See* United States v. Resto, 74 F.3d 22, 26 (2d Cir. 1996) (setting forth that a cooperating defendant's truthfulness about his own past crimes is "highly relevant to the quality of his cooperation").

[109] For example, prospective witnesses who are arrested on mail fraud charges may enter a proffer session with the reasonable expectation that prosecutors will "allow" them to plead guilty to a single five-year maximum mail fraud count in exchange for cooperation. If the proffer session, however, reveals that the witness killed Jimmy Hoffa, the prosecutor may require a guilty plea that carries the potential for longer imprisonment as a condition of cooperation. This is only natural; simply as a matter of right and wrong, the prosecutor may feel uncomfortable with allowing a plea of guilty to a five-year count to satisfy the defendant's criminal exposure for a murder. More selfishly, the prosecutor will worry that some future jury will conclude that the government paid too high a price for the testimony, and thus reject the testimony and perhaps the entire case.

[110] This practice of obtaining a full proffer of all prior crimes prevails in many districts, including the Eastern and Southern Districts of New York, but is not universal. For example, some United States Attorney's offices will enter into cooperation agreements that do not cover prior crimes of violence. A proffer session leading up to such an agreement will therefore be limited—employing a "don't ask, don't tell" approach to violent crimes.

[111] *Ming He*, 94 F.3d at 789-90.

minimize the client's involvement in the crimes under investigation and plays the central role in persuading the client to reveal prior crimes, as criminals simply do not trust a prosecutor who says that it is in the client's interest to do so.[112] The lawyer must "keep her client focused on the fact that while he is seeking the assistance and protection of the government, that entity does not share the defendant's interests."[113] Indeed, the adversarial posture of the prosecutor is at its most acute during proffer sessions. The typical proffer agreement provides only limited protection to the prospective witness if no plea agreement results from the sessions, and does not prohibit the derivative use of the defendant's statements to pursue further investigation. Thus, a prospective witness who fails this audition and gets no agreement may well be helping the government strengthen its existing case and, perhaps, to add new charges as well.

To borrow a phrase from *Ming He*, "to send a defendant into this perilous setting without his attorney is . . . inconsistent with the fair administration of justice."[114] That is why it does not happen; defense attorneys invariably attend proffer sessions, where they perform most of the functions that the *Ming He* court assumed counsel performed during the debriefing sessions. Indeed, this occurred during the three debriefing sessions that constituted the "extensive negotiations" leading to the plea agreement in *Ming He*.[115]

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[112] As counterintuitive as it seems to these clients to tell the government about crimes no one knows about, defense counsel will frequently advise them that it is in their best interests to do so. Because the prosecutor's principal goal is to enlist testimony against someone else, it is often a good time to clean all the past skeletons out of the closet and wrap them up in one favorable plea agreement. Also, few defendants are worse off than one who has pleaded guilty under a cooperation agreement, claiming to have disclosed all prior crimes to the government, only to have an undisclosed crime come to light after the agreement is reached. That defendant can both lose the § 5K1.1 motion with regard to the sentence on a guilty plea and, because the undisclosed crime is not covered by the plea agreement, be prosecuted separately for that crime.

[113] *Ming He*, 94 F.3d at 790.

[114] *Id.*

[115] *Id.* at 786. Ming He's brief reveals that during the first two proffer sessions, the prosecutors maintained that Ming He was falsely minimizing his

2. *The Debriefing Sessions*

The culmination of a successful proffer is a cooperation agreement, which is signed by both the defendant and his or her attorney. These agreements require the defendant to "cooperate fully" with the prosecutor, which explicitly includes the obligation to attend debriefing sessions.[116] The purpose of the debriefing sessions is to elicit further details of the crimes discussed during the proffer sessions and to prepare the witness for testifying. The number of debriefing sessions varies widely. If the other targets of the investigation all plead guilty, for example, there may never be any debriefing sessions at all. On the other end of the spectrum, some witnesses testify in as many as a dozen proceedings, and attend hundreds of debriefings spanning years.

Some defense attorneys attend at least part of the initial debriefing session simply because it often occurs immediately after the execution of the cooperation agreement. Others attend the initial session, or part of it, to make sure that there is a smooth transition from the high-pressure proffer sessions into the laborious (and sometimes excruciatingly boring) process of eliciting details and preparing testimony. But, as noted above, the overwhelming majority of debriefing sessions are conducted in the absence of counsel for the accomplice witness simply because defense attorneys choose not to attend them.

There are various reasons for the defense attorney's absence. First, these meetings are often measured in days, not hours, and frequently occur after normal business hours and on weekends, especially when they are held during trial. A commitment to attend them all could seriously intrude upon, and in a few instances effectively displace, the rest of a criminal practice. Expense to the client might thus be one reason for the general practice of attorneys to stay away from debriefing sessions. However, there are certainly

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role in the conspiracy. *See* Brief for Appellant at 3-4, United States v. Ming He, 94 F.3d 782 (2d Cir. 1996) (No. 95-1331). In the third session, it agreed that Ming He was finally being truthful, and the attorneys agreed to enter into a cooperation agreement. *Id.*

[116] *Ming He*, 94 F.3d at 786.

others, as evidenced by the fact that attorneys representing non-paying clients, such as Federal Defenders and court-appointed attorneys, generally stay away as well.

A second reason why counsel for the witness do not attend debriefing sessions is that some lawyers are concerned that their attendance creates the risk that they will become witnesses themselves. There are at least two ways that can occur. The first places the lawyer in the awkward position of providing testimony that undermines the client's cooperation. This may occur when: (1) the lawyer attends the debriefing sessions and takes notes, as lawyers invariably do; (2) the cooperating witness later testifies against a co-conspirator; and (3) the co-conspirator's attorney subpoenas the cooperator's attorney's notes. At least one district court has required the disclosure of such notes for use in impeaching the cooperator's testimony,[117] a decision that continues to rankle the white collar defense bar and provides a deterrent to attending debriefing sessions.[118] The second way to become a witness is in the unusual event of a dispute over what the witness actually said (or did not say) during the debriefings. Neither of these situations is palatable to the defense attorney. In the first situation, the attorney's work product is used to undermine his client's testimony. Because the prosecutive value of the testimony may have a bearing on the ultimate sentence of the witness, the attorney's work product could conceivably produce a longer sentence for the client. In the second situation, the attorney may actually help the client, but can no longer represent him because the need for the attorney as a witness may result in disqualification.[119]

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[117] *See* United States v. Marcus Schloss & Co., No. 88-CR-796 (CSH), 1989 WL 153353 (S.D.N.Y. June 5, 1989).

[118] *See* Elkan Abramowitz, *The Dilemma of Defense Counsel's Notes*, N.Y. L.J., Nov. 2, 1993, at 3; John S. Siffert & R. Erik Lillquist, *Changing Role of Defense Counsel*, N.Y. L.J., Feb. 13, 1997, at 2.

[119] *See, e.g.*, United States v. Kwang Fu Peng, 766 F.2d 82, 87 (2d Cir. 1985) (holding that where a defense attorney attended a post-arrest meeting between his client and the victim, which put the attorney in the position of being a potential witness, disqualification of the attorney at trial was proper).

Although expense, boredom and the fear of becoming a witness all provide disincentives to attending debriefing sessions, defense attorneys are too conscientious to stay away for those reasons alone, and they are not so timid that they fail to attend simply because of the standard practice not to invite them. Rather, they do not attend because their presence is not necessary. The reality is that the defense attorney regards the prosecutor as the cooperating defendant's ally.

Indeed, *Ming He* is founded in large measure on a misapprehension of the relationship between cooperating defendants and prosecutors. The court suggested a dim view of cooperators: "Many view a cooperating witness as a betrayer or informer; unquestionably, such a person is not generally held in high regard. But the fairness of our system of criminal justice may best be seen in its treatment of those individuals held in low esteem."[120] The court exercised its supervisory power to create "a more level playing field" for this lowly breed of defendant—"to protect the cooperating witness" from the prosecutor.[121] They need this protection, the court found, regardless of how "one may appraise a cooperating witness's moral worth."[122]

In fact, most prosecutors have a far more favorable opinion of accomplice witnesses. Many believe, for example, that if two people plan and carry out a murder, the one who pleads guilty and testifies truthfully should be held in much higher regard than the one who remains silent and puts the government to its proof. Although prosecutors' more favorable opinion of cooperating defendants may well be skewed by their selfish desire to bring more cases, it is also based on the notion, accepted even by the court in *Ming He*, that cooperation with the government reveals something positive about a defendant's moral worthiness, contrition and prospects for rehabilitation.[123] In addition, the interactions between the accomplice witness and the prosecutor tend to "humanize" the witness and instill more compassion in the prosecutor's decisions.

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[120] *Ming He*, 94 F.3d at 785.
[121] *Id.* at 785, 789.
[122] *Id.* at 794.
[123] *Id.* at 788.

Indeed, a poll of the criminal defense bar would reveal a widely-held view that prosecutors are altogether too cozy with accomplice witnesses. Defense attorneys commonly argue that as long as the witness testifies in a way that helps the government, prosecutors either overlook or are willing to forgive the witness who has been caught in a lie. This skepticism is not limited to defense attorneys. Some judges do not permit, or at least restrict, prosecutors' stock jury argument that cooperating witnesses should be believed because of their enforceable written promise to tell the truth.[124]

Thus, once a cooperation agreement has been negotiated for the client, the attorney who turns the client over to the prosecutor for debriefings has every reason to believe that the client could not be in safer hands. There is a very powerful institutional incentive for prosecutors to foster cooperation—"if [the government] fails to exercise its discretion fairly and even-handedly, valuable information and assistance will be lost, because defendants may come to regard . . . prosecutors as untrustworthy and simply refuse to cooperate with them."[125] Moreover, the government is not the only repeat player in the market for cooperation; the defense attorney's presence in the case (even if not at the debriefing

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[124] *See, e.g.*, United States v. Lyken, No. 96-CR-612 (ERK) (E.D.N.Y. Dec. 27, 1996). In *Lyken*, the court instructed the jury as follows:

> [The cooperating witness'] motive to testify falsely is not eliminated by the fact that the agreement this witness may have entered into with the U.S. Attorney requires her to testify truthfully. You should consider whether the witness may nevertheless believe that, if she says what she thinks is helpful to the prosecution, it is unlikely that the U.S. Attorney will claim she lied and withdraw benefits conferred by the plea agreement.

Id.

[125] United States v. Rexach, 896 F.2d 710, 714 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990). *See* United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989) (holding that the strong interest of law enforcement in cultivating cooperating defendants eliminates the danger that prosecutors will misuse the power vested in them by U.S. Sentencing Guidelines § 5K1.1), *cert. denied*, 493 U.S. 1046 (1990).

sessions) provides a further incentive for the prosecutor to treat the defendant fairly.[126]

Ironically, *Ming He* demonstrates the propensity of prosecutors to act in *favor* of cooperating witnesses even if they may not deserve it under their agreement. The prosecutor concluded that *Ming He's* initial false statement about the degree of his own criminal activity rendered him unusable as a witness. The prosecutor would have been well within her rights under the cooperation agreement to withhold the § 5K1.1 motion; she could even have prosecuted *Ming He* for making the false statements. The prosecutor did neither. Rather, she made the § 5K1.1 motion anyway, thus allowing the district court to confer whatever benefit for substantial assistance it deemed appropriate. In focusing on the "disparaging" nature of the government's motion,[127] the *Ming He* decision failed to take sufficient notice of the fact that the existence of the motion itself undermined the court's belief that a potential "prosecutorial overreaching" inheres in this relationship.[128]

3. *The Futility of the Rule and Its Unintended Adverse Consequences*

The exercise of the supervisory power in *Ming He* resulted in a rule that is of virtually no utility to its intended beneficiaries.

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[126] William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 832-33 (1989) ("Many defense lawyers are repeat players with whom the government must deal often. If prosecutors renege on their bargains, counsel will learn not to trust them, and future bargains simply will not be made.").

[127] *Ming He*, 94 F.3d at 795.

[128] *Id.* at 789. The court's misunderstanding of the relationship between prosecutors and cooperating witnesses is further evidenced by its reliance on *United States v. Pinto*, 850 F.2d 927 (2d Cir.), *cert. denied*, 488 U.S. 932 (1988). The court incorrectly found the facts in *Ming He* and *Pinto* to be "quite similar." *Ming He*, 94 F.3d at 791. *Pinto* chastised a prosecutor for questioning *a potential defense witness* in the absence of his court-appointed attorney. *Pinto*, 850 F.2d at 931. By contrast, the witness in *Ming He*, in an agreement negotiated and executed by his attorney, promised to meet with and testify for the government in exchange for an important benefit. There are no practitioners of federal criminal law who would regard the witnesses in these two cases as similarly situated.

This became clear less than two months after *Ming He* was decided, when the court decided *United States v. Brechner*.[129]

Milton Brechner, who was awaiting sentence on tax evasion charges, contacted the government to offer his assistance (in exchange for a "5K1.1 motion") against a corrupt bank officer he had been bribing. Following a proffer session, Brechner entered into a cooperation agreement, pursuant to which he recorded conversations with the bank officer for approximately a year. After the prosecutor announced his intention to indict the banker, he scheduled a debriefing session with Brechner.[130]

Perhaps because eighteen months had passed since the proffer session, Brechner's attorney attended the debriefing session. Brechner was asked about the source of the kickbacks he had received as part of his tax evasion scheme. He initially denied receiving such payments from two named sources, but his attorney took him aside for a moment, and then Brechner promptly acknowledged his receipt of those payments.[131] Thus, Brechner's attorney performed precisely the role that *Ming He* envisioned for attorneys in proffer sessions—he "resolve[d] potential disagreements between the government and the defendant and assist[ed] the defendant in clarifying his answers to ensure they [were] complete and accurate."[132]

The Assistant United States Attorney refused to make the "5K1.1 motion" anyway, and the court of appeals upheld that decision. It explicitly rejected the argument that Brechner's immediate correction of his misstatement rendered the breach immaterial, and credited the prosecutor's judgment that the lapse of credibility seriously undermined Brechner's potential as a witness.[133]

Ming He thus requires the presence of counsel at debriefing sessions (absent an explicit waiver) to protect against disparaging comments by prosecutors in "5K1.1 motions." *Brechner*, however, makes clear that even if the lawyer attends the sessions and helps

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[129] 99 F.3d 96 (2d Cir. 1996).
[130] *Id.* at 97-98.
[131] *Id.*
[132] *Ming He*, 94 F.3d at 790.
[133] *Brechner*, 99 F.3d at 99.

"fix" the false statements, the prosecutor is not only free to disparage the cooperation, but may properly refuse to make any motion at all.

The right created by *Ming He* has also been rendered useless by a new practice in the New York City United States Attorneys' Offices: standard cooperation agreements now include a waiver of the *Ming He* "right." The waivers have not been difficult to procure, since most defense attorneys had no interest in attending debriefing sessions. However, this issue has given rise to an unintended consequence that adversely impacts the defendants who are supposedly protected by the rule. As two New York defense attorneys have stated:

> [T]he holding in *Ming He* actually creates a new risk by allowing prosecutors to require that defendants sign cooperation agreements containing a blanket waiver of their right to representation at debriefing sessions. Prior to *Ming He* most prosecutors did not refuse to allow attorneys to be present. Now, however, any U.S. Attorney's office in the Second Circuit can bar counsel from sessions merely by incorporating a blanket waiver provision into the cooperation agreement.[134]

Thus, the ironic result of *Ming He* may well be to reduce the small percentage of debriefing sessions that are attended by counsel for the witness.

There is another potential adverse consequence of the rule in *Ming He* that is less susceptible of verification, but no less real. *Ming He's* exclusive focus on the cooperating witness ignored the other category of defendants whose interests are at stake in a debriefing session—the ultimate targets of the investigation. They are not present, of course, but they feel the brunt of the cooperator's testimony. To the extent that *Ming He* suggests that attorneys for the witness should take an active role in "clarifying" answers and discrepancies between the witness's and the prosecutor's version of events, it inadvertently creates the danger of real prejudice to the targets—the danger that the details provided by the witness will be tailored to conform to the prosecutor's expectations.

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[134] Siffert & Lillquist, *supra* note 118, at 2 (footnote omitted).

It is true that this danger is always present, even in the absence of the attorney for the witness. However, *Ming He* promotes the notion that the nitty gritty of a witness's testimony can be the subject of an ongoing negotiation with the government. Since everyone in the room has the same goal—producing valuable testimony—the real losers could well be the people who are indicted based on the testimony. Especially since it is not uncommon for prosecutors in the midst of investigations to have incorrect theories of what happened, *Ming He's* contribution to the already existing pressure to conform testimony in debriefing sessions may cause serious prejudice to the defendants against whom cooperating witnesses eventually testify.

Thus, at best, the exercise of the supervisory power in *Ming He* was futile; at worst, it backfired. The court's objective—to help a particular category of defendants in their dealings with increasingly powerful prosecutors—can scarcely be criticized. However, its attempt to tinker with the balance of power in the investigative setting not only intruded on presumably lawful conduct of the executive branch, but ran the risk of misgauging the dynamics of the relationships in that setting between the attorneys and between cooperating witnesses and prosecutors. That risk has materialized. The court perceived an objectionable prosecutorial practice—conducting debriefings without the witness's counsel—and exercised its "supervisory authority to bring it to an end."[135] However, the rule it announced has likely, and inadvertently, produced the opposite result of making the practice more prevalent. Further, taken together with *Brechner*, these defendants may now be worse off: rather than receive the benefit of a § 5K1.1 motion in which the prosecutor engages in full disclosure to the sentencing court (i.e., makes "disparaging" remarks about the deficiencies in the cooperation), the witness may get no motion, and no departure at all.

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[135] *Ming He*, 94 F.3d at 785.

C. *The Proper Scope of the Supervisory Power*

In both *Hammad* and *Ming He*, the Second Circuit's exercise of its supervisory power proceeds from the same premise. Both cases rely heavily on *United States v. McNabb*,[136] and indeed quote the same passage of Justice Frankfurter's description of the federal courts' duty of "establishing and maintaining civilized standards of procedure and evidence."[137] *Hammad* goes on to rely on *McNabb's* authorization of the exclusion of evidence obtained by "willful disobedience of law."[138] *Ming He* relies on a slightly different form of this supervisory power: the federal courts' inherent authority to fashion procedural rules to ensure that their proceedings are fair. Because the prosecutor's practice at issue in *Ming He* influenced sentencing proceedings for cooperating witnesses, the court was persuaded that "a procedure followed in [the] trial court is wrong," and fashioned a rule to correct it.[139]

When viewed as the authority to establish and maintain civilized standards of procedure and evidence, the supervisory power seems broad indeed. However, the decisions of the Supreme Court give the scope of this authority far more definition than the foregoing quotation from *McNabb* suggests.

The supervisory power was first announced in *McNabb*, a murder case in which agents interrogated several young, uneducated members of a Tennessee clan of mountaineers. The interrogations were plainly overbearing, not only because they spanned more than two days, but because the defendants were held incommunicado and questioned intermittently during the day and night by up to six officers. Eventually, each of the defendants made incriminating statements.[140]

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[136] 318 U.S. 332 (1943).

[137] *Id.* at 340 (quoted in United States v. Ming He, 94 F.3d 782, 789 (2d Cir. 1996; and United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988)).

[138] United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988) (internal quotations and citations omitted).

[139] *Ming He*, 94 F.3d at 792.

[140] *McNabb*, 318 U.S. at 335-36.

The two-day interrogations violated a statutory requirement that the arresting officer promptly take the defendant to the nearest available judicial officer.[141] Although Congress had not explicitly forbidden the use of confessions obtained in violation of these statutes, the Supreme Court found that the admission of such evidence "would stultify the policy which Congress ha[d] enacted into law."[142] Declining to reach the constitutional issue raised by the defendants, the Court stated its power to supervise the administration of justice in federal courts: "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[143] That statement cannot properly be read to support a broad-ranging power in federal judges to announce standards of conduct for law enforcement. Rather, *McNabb* linked the supervisory power directly to the integrity of judicial proceedings. Observing that the failure to suppress the confessions obtained in flagrant violation of federal law would make the courts "accomplices in wilful disobedience of law," the Court held that the remedy of suppression was available to the defendants.[144]

McNabb was the first of a series of Supreme Court cases in which the supervisory power was used substantively, that is, to provide a remedy for the violation of a recognized right of a criminal defendant. The Supreme Court has since made clear that this is one of the proper uses of its inherent authority.[145] The Court has exercised this power to exclude confessions obtained in violation of Federal Rule of Criminal Procedure 5(a)'s requirement that an arrestee be taken before the nearest available magistrate

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[141] The requirement was set forth in part in 18 U.S.C. § 595, the predecessor to Rule 5 of the Federal Rules of Criminal Procedure. Section 595 required the arresting officer to take the defendant to the nearest available United States Commissioner or judicial officer. The statute authorizing arrests by the Federal Bureau of Investigations, 5 U.S.C. § 300a, required that the defendant be taken before a committing officer "immediately." *Id.* at 342.

[142] *Id.* at 345.

[143] *Id.* at 340.

[144] *Id.* at 345-46.

[145] *See* United States v. Hasting, 461 U.S. 499, 505 (1983).

judge without "unnecessary delay."[146] Similarly, it has excluded evidence that had been seized by state officials in violation of the U.S. Constitution and then turned over to the federal authorities.[147] The legitimacy of this type of supervisory power is not beyond debate, especially when it is used to remedy nonconstitutional violations.[148] However, the boundaries of this form of supervisory power are relatively easy to discern; it may only be invoked when the law enforcement conduct has violated the U.S. Constitution, a federal statute or a federal rule. As the Court stated in *McNabb*, this type of supervising does not purport to be "concerned with law enforcement practices" per se.[149] Rather, it is concerned with those practices only to the extent they taint the judicial process: by receiving evidence obtained in violation of law, the "courts themselves become instruments of law enforcement."[150]

The Supreme Court's decisions establish another category of supervisory power cases in which the Court states general rules of procedure applicable to federal criminal proceedings. These decisions all involve, as Professor Beale has phrased it, "concerns intrinsic to the judicial process," arising out of a desire "to enhance the accuracy and fairness of federal criminal proceedings."[151] There are many such decisions, and all involve the supervision of events that occur in federal courtrooms.[152]

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[146] Mallory v. United States, 354 U.S. 449, 452-53 (1957) (following the reasoning of *McNabb*).

[147] Elkins v. United States, 364 U.S. 206, 223 (1960) (overruling the "silver platter" doctrine originating in Lustig v. United States, 338 U.S. 74, 79 (1949)).

[148] *See* Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases; Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1494-06 (1984) (suggesting that the U.S. Constitution authorizes federal courts to fashion remedies of constitutional violations, and perhaps of violations of federal rules, but not of violations of acts of Congress). Beale's article sets forth a comprehensive and excellent discussion of the origins, legitimacy and sources of the supervisory power, a subject that is beyond the scope of this Article.

[149] *McNabb*, 318 U.S. at 347.

[150] *Id.*

[151] Beale, *supra* note 148, at 1490, 1449-50.

[152] *See, e.g.*, United States v. Nobles, 422 U.S. 225, 238-42 (1975) (requiring

Most of the Supreme Court's supervisory power decisions fall in these two categories, and the large majority fall in the latter category—they establish rules for judicial proceedings.[153] Although there have been exceptions,[154] the Court has never exercised the supervisory power to fashion a new standard of conduct for law enforcement officers engaged in criminal investigations. Moreover, its most recent treatment of the issue of supervisory power casts grave doubt on the authority of courts to prescribe rules of conduct in criminal investigations.

United States v. Williams[155] addressed the role of the supervisory power in the "no-man's land" between the courts' own processes and the operations of law enforcement: the federal grand jury. The lower federal courts, including the Second Circuit, had frequently resorted to the supervisory power to prescribe rules of conduct for prosecutors in the grand jury.[156] In some of these cases, the supervisory power was used not to enforce a violation of the U.S. Constitution, statute or rule, but to impose a procedural requirement that the Supreme Court had already concluded was not required by existing law.[157]

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disclosures at trial to permit effective cross-examination); McCarthy v. United States, 394 U.S. 459, 1171 (1969) (establishing procedure for accepting guilty plea); Marshall v. United States, 360 U.S. 310, 313 (1959) (per curiam) (ordering a new trial when jurors were exposed to prejudicial publicity); Roviaro v. United States, 353 U.S. 53, 55 (1957) (qualifying the "informer's privilege" to require disclosure of identity of informant when that is essential to a fair trial); Offutt v. United States, 348 U.S. 11, 15 (1954) (holding that summary contempt proceeding may not be tried by a district judge who is embroiled in controversy with alleged contemnor); Ballard v. United States, 329 U.S. 187, 193 (1946) (holding that jurors must be selected from fair cross-section of community).

[153] *See* Beale, *supra* note 148, at 1448-56.

[154] *See* Beale, *supra* note 148, at 1448 n.101.

[155] 504 U.S. 36 (1992).

[156] *See, e.g.,* United States v. Jacobs, 547 F.2d 772, 778 (2d Cir. 1976) (dismissing perjury indictment where the prosecutor failed to follow the office's practice of administering certain warnings before allegedly perjurious testimony), *cert. dismissed*, 436 U.S. 31 (1978); United States v. Estepa, 471 F.2d 1132, 1133 (2d Cir. 1972) (dismissing indictment where grand jury was misled into thinking that it was receiving eyewitness, rather than hearsay, testimony).

[157] The limitations placed on the use of hearsay evidence by the court in *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), for example, were

Williams involved a Tenth Circuit rule that required prosecutors to present substantial exculpatory evidence to the grand jury. The Supreme Court held that the supervisory judicial authority on which the rule was based did not exist. In doing so, it reaffirmed the limitations of both strands of the supervisory authority supported by its previous decisions. It held that the substantive strand may properly be invoked only "to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the U.S. Constitution or laws)."[158] Thus, where prosecutorial misconduct violates one of the federal rules governing grand jury practice, the supervisory power is available to enforce those rules. Since there was no rule regarding the presentation of exculpatory evidence, the Tenth Circuit's imposition of that requirement was improper. As for the procedural component of the supervisory power, *Williams* stressed that it "deal[s] strictly with the courts' power to control their own procedures."[159] In light of the grand jury's "operational separateness from its constituting court," its processes are simply not those of the court, and the supervisory power may thus not be used to prescribe modes of grand jury procedure.[160]

Williams is especially instructive because of the unique position of the grand jury between the judicial and executive branches. It has an institutional relationship with the court, which both empanels it and presides over disputes occurring within it, and it thus has been characterized as an arm of the court.[161] It has also been described, accurately, as an investigative agency of the executive branch.[162] However the grand jury is characterized, there is no aspect of federal criminal investigations that is more closely related to the judicial branch. The supervisory authority of

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rejected by the Supreme Court in *Costello v. United States*, 350 U.S. 359 (1956).

[158] *Williams*, 504 U.S. at 46 (citing Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)).

[159] *Id.* at 45.

[160] *Id.* at 49-50. *See* Rory K. Little, *Who Should Regulate the Ethics of Prosecutors?*, 65 FORDHAM L. REV. 355, 408-09 (1996) (noting that the "inherent authority" over prosecutors is normally limited to in-court behavior).

[161] *See* Beale, *supra* note 148, at 1459 n.183 (collecting cases).

[162] Beale, *supra* note 148, at 1459 n.183 (collecting cases).

federal courts therefore ought to be most expansive in that context.[163] That the supervisory power is narrowly circumscribed in the grand jury context places in clear relief the limited authority to supervise other aspects of criminal investigations.

Thus, with the narrow exception of matters occurring in the federal grand jury, the supervisory power of federal district courts should be limited to fashioning remedies for violations of existing federal law and prescribing rules of procedure for their own, in-house proceedings. Once the supervisory power exceeds these boundaries, it intrudes on the functions and prerogatives of the other branches of government. The use of the power to implement remedies for violations of the U.S. Constitution or existing federal law implicates the integrity of the judicial branch. Judges have a legitimate interest in fashioning remedies that keep the proceedings before them free from the taint of illegally obtained evidence. However, "rarely, if ever, will judicial integrity be threatened by conduct outside the courtroom that does not violate a federal statute, the Constitution or a procedural rule."[164] Indeed, there is

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[163] For that reason, although courts are divided on the question, there may well remain the authority to dismiss indictments based on grand jury misconduct even in the absence of a violation of a rule or a statute or the U.S. Constitution. *See, e.g.,* United States v. Rodriguez, No. 95-CR-0754 (HB), 1996 WL 479441, at *1 (S.D.N.Y. Aug. 22, 1996) ("[C]ourts may only dismiss an indictment for prosecutorial misconduct where such misconduct violates a clearly established Rule of Criminal Procedure, statute or constitutional guarantee."); United States v. Orjuela, 809 F. Supp. 193, 198 (E.D.N.Y. 1992) (interpreting *Williams* as leaving open the possibility that certain kinds of prosecutorial misconduct could warrant the dismissal of an indictment). In *Williams*, the Court provided that "any power federal courts *may* have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Williams*, 504 U.S. at 50 (emphasis added). Thus, although some limited authority may remain, it is unclear (1) what sorts of prosecutorial conduct could trigger a court's use of its supervisory powers; and (2) how close that conduct would come to a due process violation. *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 259-61 (1988) (suggesting that dismissal of an indictment might be appropriate if prosecutor suborns perjury, or if there is "a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process").

[164] United States v. Simpson, 927 F.2d 1088, 1091 (9th Cir. 1991).

no judicial integrity interest at stake in such circumstances. The refusal to provide a federal forum for the trial of criminal charges because of judicial disapproval of a practice permitted by the U.S. Constitution and Congress intrudes on the functions of the legislative and executive branches.[165]

In addition, the deployment of the supervisory power outside of its proper boundaries puts judges in uncharted territory. Courts are not well-equipped to evaluate the merits of particular investigative practices. The adjudicative process is not designed to gather the type of information available to policymakers, and the required focus on only the issue in dispute precludes the broader perspective that policymakers should bring to the task. The expansion of judicial supervisory power in this area creates rules based on misunderstandings of investigations or other extrinsic, nonjudicial processes. Judicial supervision of this sort also produces the uncertainty that undefined, unbounded power engenders.[166]

Hammad and *Ming He* plainly exceed the boundaries of the supervisory power. The law enforcement conduct at issue in *Hammad* complied with the U.S. Constitution and the laws and rules governing federal criminal investigations. There can be no argument that the integrity of the judicial process is tainted by the receipt into evidence of statements obtained from represented targets, especially when those statements would be received without question in the fortuitous event that the prosecutor was isolated from this aspect of the investigation. By substituting a rule of professional conduct for a positive statement of federal law protecting all defendants from the government, *Hammad* exercised substantive supervisory power in the absence of a violation of an established standard.[167]

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[165] *See* Beale, *supra* note 148, at 1508-10.

[166] *See, e.g.*, United States v. Ming He, 94 F.3d 782 (2d Cir. 1996). Now that the rule requiring the presence of counsel at debriefing sessions absent a waiver has been nullified by standard-form waivers, there have already been calls for the exercise of the supervisory power to prohibit the waivers. Edward M. Shaw, *Sentencing Departure for Cooperation and Contract Law*, N.Y. L.J., Feb. 26, 1977, at 1.

[167] United States v. Hammad, 858 F.2d 834 (2d Cir. 1988).

Ming He based its exercise of authority in part on purely procedural grounds. It stated correctly that its supervisory authority extends to sentencing, and reasoned that the effect of the practice at issue on the sentencing of cooperating witnesses rendered the exercise of supervisory authority appropriate.[168]

This approach misconstrues the breadth of the authority to fashion procedural rules for the court's own proceedings. *Every* form of evidence-gathering by law enforcement officials can affect sentencing, but that does not give judges the power to prescribe the rules of investigation. The right to supervise the judicial process is much narrower. It is limited to the proceedings that occur in the courthouse. The case relied on by *Ming He*, *United States v. Herrera-Figueroa*,[169] demonstrated the limitation. In that case, the Ninth Circuit exercised its supervisory power to direct that probation officers in the circuit must permit attorneys to attend presentence interviews.[170] The Probation Department is indisputably an arm of the judicial branch. As the Ninth Circuit stated: "In prescribing a rule applicable only to the conduct of personnel within the judicial branch, we act in a sphere where the scope of our supervisory power is at its apex."[171] Indeed, it explicitly cautioned against the use of this authority to set rules of conduct for members of the executive branch.[172] That is precisely what *Ming He* accomplishes.

CONCLUSION

Although the temptation to supervise prosecutors is very strong, the power of federal courts to prescribe standards of conduct for them is limited. The power to fashion rules of procedure does not reach beyond the judicial process itself. The power to remedy improper conduct is limited to violations of federal law in the evidence-gathering process that actually prejudice defendants.

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[168] *Ming He*, 94 F.3d at 792.

[169] 918 F.2d 1430, 1434 (9th Cir. 1990).

[170] *Id.* at 1433.

[171] *Id.* at 1434.

[172] *Id.* at 1434 n.7 (citing United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

That judges may lack the power to create and enforce new rules for criminal investigations does not render them powerless in dealing with prosecutorial misconduct. Extensive self-regulation by the Department of Justice exists, governing not only contacts with represented persons, but also the issuance of subpoenas to defense attorneys,[173] communications with the media,[174] warnings to grand jury witnesses,[175] subpoenas to the media[176] and a host of other activities. One method of deterring objectionable conduct is requesting that the Department of Justice initiate its own disciplinary proceeding.[177] Although there is natural cynicism about the efficacy of self-policing, particularly in the defense bar, this is real discipline. The Department of Justice receives many complaints of prosecutorial misconduct, investigates these complaints and publicly discloses its findings and its disposition of the allegations.[178]

In any event, if there is in fact a delegation of excessive power to prosecutors, the appropriate and principled way to remedy it is through remedial legislation or the promulgation of federal rules pursuant to the Rules Enabling Act.[179] Although the supervisory power of federal courts may seem the easier way to, judges have learned the hard way—through *Hammad* and *Ming He*—that their temptation must be resisted.

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[173] *See* U.S. ATTORNEY'S MANUAL, *supra* note 81, § 9-2.16(a).

[174] U.S. ATTORNEY'S MANUAL, *supra* note 81, §§ 1-7.400, 9-2.211.

[175] U.S. ATTORNEY'S MANUAL, *supra* note 81, § 9-11.150.

[176] U.S. ATTORNEY'S MANUAL, *supra* note 81, § 9-2.161.

[177] *See* United States v. Hasting, 461 U.S. 499, 506 n.5 (1983); 28 C.F.R. § 0.39 et seq.

[178] *See, e.g.*, OFFICE OF PROFESSIONAL RESPONSIBILITY FISCAL YEAR 1995 ANNUAL REPORT (1995).

[179] 28 U.S.C. §§ 2071-2077.